

Opinion issued September 30, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-11-00324-CV

PEARLAND CAPITAL GROUP, LP, Appellant

V.

**HORIZON UNITED GROUP INTERNATIONAL, LLC D/B/A HORIZON
GROUP INTERNATIONAL, BRINKMANN ROOFING & SHEETMETAL
COMPANY, BRINKMANN INVESTEMENTS, INC., AND NATIONWIDE
METAL BUILDINGS, LLC, Appellees**

**On Appeal from the 125th District Court
Harris County, Texas
Trial Court Case No. 2009-60160**

MEMORANDUM OPINION

Appellant, Pearland Capital Group, LP (“PCG”), brought this interlocutory appeal¹ to challenge the trial court’s April 13, 2011 order denying its motion to sever and compel arbitration. In its sole point of error, PCG contended that the trial court erred in denying its motion to sever and compel arbitration of the claims brought against it by appellee, Horizon United Group International, LLC doing business as Horizon Group International (“Horizon”), that are “based upon the AIA construction contract between” it and Horizon or, alternatively, in denying its and Horizon’s “respective alternative motions to compel arbitration of all claims in dispute,” including those claims by and against PCG, Horizon, and appellees Brinkmann Roofing & Sheetmetal Company, Inc., Brinkmann Investments, Inc. (collectively, “Brinkmann”), and Nationwide Metal Buildings, LLC (“Nationwide”).²

Background

During the pendency of this interlocutory appeal, neither party sought temporary orders from this Court. *See* TEX. R. APP. P. 29.3. After both PCG and Horizon filed their briefing in this Court, the trial court, on August 31, 2011, signed an Order Reconsidering Court’s Prior Ruling Regarding Arbitration, in which it effectively dissolved its original order and compelled to arbitration “those

¹ TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1) (Vernon 2005).

² Both Brinkmann and Nationwide have elected not to file appellate briefs.

claims arising under the Horizon/[PCG] AIA construction contract.” The trial court made additional orders severing certain claims into a separate cause number.

Not made aware of the trial court’s new order, this Court, on September 7, 2011, sent the parties notice that this appeal would be set for submission on September 28, 2011. On September 13, 2011, nearly two weeks after the trial court effectively dissolved the order being appealed and entered its new order, PCG filed in this Court a Motion to Dismiss Appeal of Interlocutory Order Denying Arbitration. In this motion, PCG contended that, as a result of the trial court’s new order granting it the relief that it had requested in its application and compelling arbitration of certain contract claims, this Court should dismiss the appeal. On the same day, Horizon filed in this Court a Motion to Vacate Subsequent Order of Trial Court, arguing that the trial court did not have jurisdiction to reconsider its April 13, 2011 order denying arbitration. Horizon asked that we vacate the trial court’s new order and proceed to address PCG’s appeal of the original order.

Motion to Dismiss

In its motion to dismiss, PCG argues that we must dismiss the interlocutory appeal because the trial court entered a new order granting its motion to compel arbitration and compelling arbitration of certain claims.

It is undisputed that we have jurisdiction over PCG's appeal of the trial court's original order denying PCG's application to compel arbitration. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1) (Vernon 2005) (providing that party may appeal order denying application to compel arbitration). The parties dispute, however, whether the trial court had jurisdiction to enter its new order and, if so, the affect of the new order on this appeal.

Texas Rule of Appellate Procedure 29.5 provides,

While an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and unless prohibited by statute may make further orders, including one dissolving the order complained of on appeal. If permitted by law, the trial court may proceed with a trial on the merits. But the court must not make an order that:

- (a) is inconsistent with any appellate court temporary order; or
- (b) interferes with or impairs the jurisdiction of the appellate court or effectiveness of any relief sought or that may be granted on appeal.

TEX. R. APP. P. 29.5. Here, the trial court's new order, in which it reconsidered its prior ruling and granted PCG's application, was clearly permitted under the rules. *See id.* The trial court's new order was not inconsistent with any temporary orders, as neither party requested such orders during the pendency of the appeal. *See id.*; *see also* TEX. R. APP. P. 29.3.

The trial court's new order rendered the appeal of the original order moot. *See Providian Bancorp Servs. v. Hernandez*, No. 08-04-00186-CV, 2005 WL

82197, at *1 (Tex. App.—El Paso Jan. 13, 2005, no pet.) (mem. op.) (dismissing as moot interlocutory appeal from order denying motion to compel arbitration after trial court reconsidered its prior ruling and entered order compelling arbitration); *Mobil Oil Corp. v. First State Bank of Denton*, No. 2-02-119-CV, 2004 WL 1699928, at *1 (Tex. App.—Fort Worth July 29, 2004, no pet.) (dismissing as moot interlocutory appeal from class certification order after trial court vacated order and dismissed class action); *Board of Trustees, Galveston Wharves v. Galveston Waterfront Ventures, Inc.*, No. 14-03-00265-CV, 2003 WL 21026383, at *1 (Tex. App.—Houston [14th Dist.] May 8, 2003, no pet.) (mem. op.) (dismissing as moot appeal of temporary injunction after trial court entered permanent injunction); *see also Roccaforte v. Jefferson County*, 341 S.W.3d 919, 924 & n.9 (Tex. 2011) (discussing cases “in which further proceedings mooted the issues raised” in interlocutory appeal).

To the extent that Horizon suggests that Texas Rule of Appellate Procedure 29.5(b) precluded the trial court from reconsidering the order being appealed, we note that the rule expressly and specifically authorizes a trial court to dissolve an order that is being appealed. Finally, PCG, the only party that appealed the trial court’s original order, is now seeking dismissal of its appeal. Thus, we conclude that the trial court’s new order has not interfered with or impaired the effectiveness of any relief sought or that may be granted on appeal.

Accordingly, we dismiss the appeal as moot. We also deny Horizon's motion to vacate the trial court's subsequent order.

Conclusion

We dismiss the appeal as moot.

Terry Jennings
Justice

Panel consists of Justices Jennings, Sharp, and Brown.